In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 152.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

On the 23d day of May, 1902, Robert A. Chesebrough, the plaintiff in error, filed his petition in the district court of the United States for the southern district of New York, to recover the sum of $600 from the United States, alleged to have been paid to the collector of internal revenue for the second district of New York, for the purchase of certain internal-revenue stamps to be affixed to a deed for the conveyance of certain real estate. (Record, p. 6.)

It appears from the allegation contained in the petition that about eighteen months prior to the commencement of this suit the petitioner had purchased from the collector of internal revenue

for the second district of New York $600 worth of internal-revenue stamps with which to stamp a deed for certain real property which he was about to sell to the Chesebrough Building Company, of the city of New York. The petitioner now seeks by this suit to recover back from the Government this amount of money, upon the ground that the law of Congress requiring a deed for the conveyance of real estate to be stamped with internal-revenue stamps was unconstitutional and void. (Record, pp. 3–6.)

The plaintiff in error alleges in his petition that he was unable to sell the real estate to the proposed purchaser until the deed was properly stamped as required by law, for the reason that the company would not accept the deed unless internal-revenue stamps to the value of $600 were affixed thereto; that because of such requirement on the part of the proposed purchaser, and under compulsion of law, he was compelled to purchase from the collector of internal revenue for the second district of New York internal-revenue stamps of the value of $600, which he thereafter affixed to said deed (Record, p. 4).

It is not alleged that any "protest" was made to the collector of internal revenue at the time of such purchase and payment, or that any "notice" was given or served upon the collector of internal revenue, or any other officer of the United States, to the effect that a suit would be instituted for the recovery of the money so paid; nor is it alleged

that an appeal was thereafter taken to the Commissioner of Internal Revenue. More than eighteen months elapsed after such payment before the United States Government, or any of its officers, were notified that the plaintiff in error intended to present a claim for the refundment of these moneys, at which time, to wit, on the 9th day of January, 1902, an application was made by the plaintiff in error to the Commissioner of Internal Revenue for the refunding of the amount so paid by him for the purchase of stamps eighteen months before. (Record, p. 5.)

So far as appears from the petition, the payment of the moneys now sought to be recovered was entirely voluntary upon the part of the taxpayer, unless the mere existence upon the statute books of what the plaintiff in error now claims to be an unconstitutional law can be regarded as such a compulsion as would relieve the payment so made of its voluntary character.

The first question, therefore, is whether, under the statutes of the United States applicable to the collection and payment of internal revenues, there be such a thing as a voluntary payment of an internal-revenue tax which would prevent a subsequent recovery from the Government, or, in other words, whether in making a payment of an internal-revenue tax "a protest" or "notice of suit" is necessary and essential as a condition precedent to suit against the United States for the recovery of the moneys so paid. (Record, pp. 4 and 5.)

Paragraph 5 of the petition alleges that prior to the institution of this action the petitioner, pursuant to the laws of the United States and the regulations of the Treasury Department in such case made and provided, made a written application to the United States Commissioner of Internal Revenue on the 9th day of January, 1902, for the refunding of the amount so paid for stamps as aforesaid, which application was denied (Record, p. 5).

Then follows an allegation to the effect that the provisions of the war-revenue act of June 13, 1898, requiring a tax to be paid to the United States upon conveyances, are unconstitutional and void, and in violation of certain provisions of the Federal Constitution, for the reason that the tax imposed by such law is a "direct tax" within the meaning of the Constitution (Record, p. 5).

To this petition a demurrer was interposed by the United States attorney for and on behalf of the United States, on the ground that the petition did "not state facts which would constitute a claim on the part of the claimant against the United States." (Record, p. 6.)

On the 12th of June, 1902, the case was brought on for hearing and argument before the Hon. George B. Adams, United States district judge for the southern district of New York, whereupon it was "ordered, adjudged, and decreed that the demurrer to the petition be sustained, and that the petition be dismissed." On the same day a judgment was duly entered and filed with the clerk of

said court sustaining the demurrer and dismissing the petition. (Record, p. 7.)

On July 10, 1902, the claimant filed his petition for a writ of error to the Supreme Court of the United States, which was allowed on the same day by the Hon. George B. Adams, United States district judge, and the case is now here for a review of that judgment. (Record, pp. 1 and 2.)

QUESTIONS OF LAW.

This appeal presents two questions of law for the consideration of this court, one statutory, the other constitutional.

First. Under the Federal statutes relative to the collection and payment of internal revenue, is there such a thing as voluntary payment of an internal-revenue tax which will thereafter preclude the party paying the same from maintaining a suit against the United States for its recovery?

Second. The other question of law presented on this appeal is the constitutionality of the provisions of the act of Congress of June 13, 1898 (30 Stat., 448, 460), known as the war-revenue act, which levied a tax of 50 cents on each deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds $100, and does not exceed $500; and for each additional $500 or fractional part thereof in excess of $500, 50 cents.

The following are the portions of the act of June 13, 1898, known as the war-revenue act, material for the consideration of this case:

Adhesive stamps.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or desctiption whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court.

Schedule A.—Stamp taxes.

Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

REPEAL.

Section 7 of the act of April 12, 1902, entitled "An act to repeal war-revenue taxation and for other purposes" provides as follows:

SEC. 7. That section four of said act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed (32 Stats., p. 96).

WHEN TO TAKE EFFECT.

SEC. 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July 1, 1902.

I.

The payment of this tax by the plaintiff in error was purely voluntary, and unless the Government has by statute conferred upon the taxpayer the right to sue for the recovery of taxes voluntarily paid, there can be no recovery, and the demurrer was properly sustained.

We will concede, but only for the purpose of the argument, that the tax complained of is illegal and void. It appears from the petition that Mr. Chesebrough purchased from Charles H. Treat, the United States collector of internal revenue for the second district of New York, documentary internal-revenue stamps to the amount of $600, for the purpose of affixing the same to a deed of conveyance. It further appears that neither the collector of internal revenue, nor any officer of the United States, at the time of the purchase was informed of the purpose for which such stamps were to be used, and that no "protest" or "remonstrance," either written or verbal, was made at the time of such purchase, nor until about eighteen months thereafter, when an "application" was made to the Commissioner of Internal Revenue for the refunding of the amount paid. It is the claim, however, of the plaintiff in error that the stamps

were purchased by the petitioner from the collector "under compulsion of law." The precise question, therefore, is;—having a given law upon the statute books which is unconstitutional and void, is it possible to pay the tax imposed by such law in such a manner as to estop the taxpayer from recovering by a subsequent suit against the Government the amount of the tax so paid to the Government.

If the facts in this case do not constitute a voluntary payment by the taxpayer, then there is no such thing under the law as a voluntary payment which will prevent a subsequent recovery.

In the consideration of this proposition we will first discuss what we conceive to have been the law in the United States as it existed prior to the enactment of the statutes which have conferred upon the taxpayer the right to maintain a suit for a recovery of the tax when erroneously or illegally exacted, and which selfsame laws have conferred upon the Commissioner of Internal Revenue the right to make refundment of taxes illegally exacted or erroneously paid in certain cases upon application.

(A)

Prior to the passage of the Federal Statutes, hereafter to be considered, an internal-revenue tax, if paid "voluntarily," without "protest" or "notice of suit," could not be recovered.

Cooley, in his work on the Law of Taxation, third edition, page 1495, has the following to say

with reference to the voluntary payment of taxes:

> That a tax or assessment voluntarily paid can not be recovered back, the authorities generally agree. And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment, which the law would not compel him to make, he can not afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making the payment, *is not put on his guard by any warning or protest*, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. (See full list of cases cited.)

In the case of *Elliott* v. *Swartwout* (10 Peters, 137, 152) Mr. Justice Thompson, in delivering the opinion of the court, said:

> The case put in the second point is, where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the Treasury, and no objection made at the time of the payment,

or at any time before the money was paid over to the United States. The manner in which the question is here put presents the case of a *purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money.* It is, therefore, to be considered as a *voluntary payment*, by mutual mistake of law; *and in such case no action will lie to recover back the money.* The construction of the law is open to both parties, and each presumed to know it. Any instruction from the Treasury Department could not change the law, nor affect the rights of the plaintiff. He was not bound to take and adopt that construction; he was at liberty to judge for himself and act accordingly. These instructions from the Treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he paid over the money, *without any intimation having been given that the duty was not legally charged, can not be sustained upon any sound principles of policy or law.* There can be no hardship in requiring the party to give *notice* to the collector that he considers the duty claimed illegal and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim indemnity from the Government. But if the party is entirely silent, and no

> intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the Government to indemnify him against a suit. It is no sufficient answer to this, that the party can not sue the United States. *The case put in the question is one where no suit would lie at all. It is the case of a voluntary payment, under a mistake of law*, and the money paid over into the Treasury; and if any redress is to be had, it must be by *application to the favor of the Government*, and not *on the ground of a legal right.*

In the case of *Erskine* v. *Van Arsdale* (15 Wall., 75, 77), Mr. Chief Justice Chase, in delivering the opinion of the court, said:

> Taxes illegally assessed and paid may always be recovered back, *if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.*

The authorities are overwhelming to the effect that if payment is clearly voluntary, "without compulsion," "protest," or "notice of suit," there can be no recovery unless such right of recovery is expressly or by necessary implication conferred by statute.

(B.)

An examination of the Federal Statutes relative to the collection, payment, and refundment of internal-revenue taxes illegally or erroneously paid for the purpose of ascertaining whether a case of voluntary payment, so far as the right of suit for its recovery is concerned, rests upon common ground with a case of payment under protest or notice of suit.

By the act of Congress approved March 3, 1863, entitled, "An act to amend an act entitled, 'An act to provide internal-revenue to support the Government, and pay the interest on the public debt, approved July 1, 1862,' and for other purposes" (12 Stats., 713, 729), we find the following provision:

> SEC. 31. *And be it further enacted*, That the Commissioner of Internal Revenue, subject to the regulations of the Secretary of the Treasury, shall be, and hereby is, authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses *paid under protest*.

In the case of *City of Philadelphia* v. *Collector* (5 Wall., 720), Mr. Justice Clifford, in delivering the opinion of the court, in referring to the above provision of the act of 1863, said (p. 730):

> Collections were required by the twenty-third section of the act (the act of which

the above is an amendment, 12 Stats., 434) to be completed within six months, and collectors were required to render their final account and pay the sums collected into the Treasury within that period. Argument is that inasmuch as collectors were required by that act to pay all moneys collected into the Treasury, they can not be held liable to refund any portion of such collections; but the same requirement is made of the commissioner, and yet he is authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and to pay all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses *paid under protest*.

This being the law with reference to the voluntary payment of taxes, the question arises as to whether the enactment of the law of 1866, contained in section 3226, Revised Statutes, operated as a waiver, so far as the Government is concerned, of its right to require that the tax be paid under "protest" as a preliminary prerequisite to appeal to the Commissioner of Internal Revenue under that section, for the purpose of laying the foundation for a suit against the United States in case the decision of the Commissioner was adverse to the appellant. If such be the law, it must be found from some implication contained in sections 3220, 3226, 3227, and 3228, Revised Statutes. There is no express provision of law by which the United States has ever consented to be sued for the recov-

ery of a tax which has been voluntarily paid. The whole theory of the law giving the taxpayer the right to a suit is predicated upon the assumption that the tax was paid involuntarily and under compulsion. Keeping in mind, therefore, that at the time of the passage of this law the taxpayer could not maintain a suit against the United States or against the collector for a tax which he paid "voluntarily," and without "protest" and under "no compulsion," except the mere fact that there existed an unconstitutional law, as he claimed, which required him to pay the tax, let us examine the various acts for the purpose of determining whether expressly or by necessary implication the preliminary prerequisite of a protest was abrogated. The law says:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, etc.

Does not this language clearly presuppose an adverse decision by the collector? The language is "until an appeal shall have been duly made," and it seems to me that the word "appeal" is used in its ordinary legal signification. It does not say until an "application" has been made to the collector of internal revenue for the refundment of the tax, but until an "appeal" has been made, which must, as I take it, show a clear intention on

the part of Congress to require that the tax be paid under protest or compulsion, as was the law of the land at the time this right was conferred by statute upon the taxpayer.

> Section 3227 provides that no suit for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintained in any court, unless the same is brought within two years after the cause of action accrued. * * *

Section 3228 is entitled "Claims for refundment, limitation," and provides as follows:

> All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued.

Section 3226 was originally section 19 of the act of July 13, 1866 (14 Stat., 97, 152), and was as follows:

> SEC. 19. *And be it further enacted*, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such

suit shall be brought within six months from the time of said decision or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal then said suit may be brought at any time within twelve months from the date of such appeal.

Sections 3227 and 3228 are evidently taken from section 44 of the act of Congress passed June 5, 1872 (17 Stat., 229, 257). Section 44 of that act is as follows:

SEC. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after: *Provided*, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: *And provided further*, That where a claim shall be pending before said Commissioner the claimant may bring his action within

> one year after such decision, and not after: *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained.

Section 3220 Revised Statutes (act of July 13, 1866, 14 Stats., 111), authorizes the Commissioner of Internal Revenue to refund taxes, penalties, etc., and is as follows:

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of the suit. * * *

On page 104, Internal-Revenue Laws, 1900, we find the following quotation from the case of *Real Estate Savings Bank* v. *United States* (1880), 16 Court of Claims Rep., 335:

> It is a principle universally recognized and enforced in the courts of law that an action can not be maintained for the recovery back of money paid in the discharge of a tax illegally assessed, unless the payment was made *under protest*. But that principle has as uniformly been held by the Commissioner of Internal Revenue and other officers of the

> Department as altogether too technical and too exacting for application to the *refund of taxes under this section* (3220), and from the beginning no proof of protest has ever been required. (Id., 104 U. S., 728.)

Although the Commissioner of Internal Revenue may entertain *an application for refund* of taxes under section 3220, the question still remains as to whether, in order to lay the foundation for a suit against the United States to recover back taxes erroneously or illegally paid under section 3226 it would not still be necessary to file *a protest* at the time of the payment or to serve notice of suit for the recovery of the tax so paid.

(C.)

From a consideration of the foregoing provisions of the Federal Statutes relative to this subject, we maintain that a payment under protest or with notice of suit is a necessary prerequisite to the right of action on the part of the claimant against the Government for a recovery of the tax illegally assessed and collected.

From these provisions of the law we maintain that it is a necessary prerequisite to the maintenance of a suit against the United States for the recovery of a tax erroneously or illegally paid that some sort of a protest should be made at the time of payment, and that if it appears that the tax was voluntarily paid that there can be no right of recovery against the United States.

Section 3226 clearly presupposes such a protest, and appeal to the Commissioner of Internal Revenue. Section 3227 provides for a limitation of two years in which suit must be brought for such recovery, and section 3228 provides for a limitation of two years in which claims for a refundment might be made and receive the consideration of the Commissioner of Internal Revenue. In support of this proposition we refer to the uniform decisions of this court since the enactment of these laws, wherein it is asserted over and over again that in order to entitle the taxpayer to maintain a suit against the United States, or the collector, for the recovery of such a tax, it must appear that the tax was paid "under protest" or with "notice of suit."

In the case of *Cheatham et al.* v. *United States* (92 U. S., 85, 88), Mr. Justice Miller, in delivering the opinion of the court, in referring to section 3226 (14 Stat., 152), said:

> So also, in the internal-revenue department, the statute which we have copied *allows "appeals from the assessor" to the Commissioner of Internal Revenue;* and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.
>
> It will be readily conceded, from what we have here stated, that the Government has

> the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

In 1879 the case of *Wright* v. *Blakeslee* (101 U. S., 178) was decided. Mr. Justice Bradley, in delivering the opinion of the court, distinctly recognized the right of the Government under the law as it existed at that time, and which was the same as it is to-day, to require the payment to be made under protest in some form, in order to entitle the taxpayer to a recovery. The court said:

> On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that the party interested should give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection thereto. * * * *No such written notice or protest is required of a party* paying illegal taxes under the internal-revenue laws. *He must pay under protest in some form, it is true, or his payment will be deemed voluntary.* (*City of Philadelphia* v. *The Collector*, 5 Wall., 720; *The Collector* v. *Hubbard*, 12 id., 1.) But while a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty *was made under protest, which may have been either written or verbal.*

It is clear from these decisions that there must be such a thing as a voluntary payment of an internal-revenue tax, and that a voluntary payment would defeat the right of the party making such payment to a recovery by suit. If there was ever a case of voluntary payment of an internal-revenue tax, such a case is presented by the record now before this court.

In the case of Schmitt et al. *v.* Trowbridge (Federal Cases, No. 12468), which was decided in 1878 in the district court for the eastern district of Michigan, Mr. Justice Brown, in charging the jury, said:

> This is an action against the collector of internal revenue of this district, and, in fact, against the Government through him as defendant, to recover certain taxes said to have been illegally assessed and collected upon 243 boxes of matches made by the plaintiffs. The law provides that, in all cases where the assessment is disputed, the amount of the tax shall be paid, *and upon protest being made and an appeal taken to the Commissioner of Internal Revenue*, in case his decision sustains the validity of the tax, a suit may be brought against the collector, and the case submitted to a jury. That is the only way which the law provides for the rehearing of assessments, so that in the end the validity of these assessments may always be submitted to a jury. I charge you, as requested by plaintiff in his first request, that the payment of the assessment

> in this case, and under the circumstances proved, is not to be considered *a voluntary one*. All that this request means is that where the assessment is illegally exacted *under protest*, and the appeal properly taken, the plaintiff may sue to recover it back.

So in the case at bar it was impossible to plead in the petition that "due protest" had been made at the time of the payment of the tax, because no such protest was made; and it was likewise impossible to allege that an "appeal" had been duly taken to the Commissioner of Internal Revenue, for the reason that there was nothing to appeal from. And so the pleader states (Record, p. 5) that the petitioner "made a written application" to the United States Commissioner of Internal Revenue.

In the case of *Stewart* v. *Barnes* (153 U. S., 456), which was a suit against a collector of internal revenue for the purpose of recovering an internal-revenue tax on distilled spirits alleged to have been unlawfully exacted, Mr. Justice Shiras, in delivering the opinion of the court, said (p. 459):

> No evidence was introduced to show the nature of the "protest made," but it was unnecessary to prove more than that the payment was made "under protest," which was admitted by the plea. (*Wright* v. *Blakeslee*, 101 U. S., 174.)

In the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 554), Mr. Chief Justice Fuller intimated, as I take it from that case, that there

might be such a thing as a voluntary payment of an internal-revenue tax, for which there could be no subsequent recovery, and thus sufficient grounds were afforded for the interference by a court of equity to restrain the company from voluntarily paying the tax. He said:

> The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the Government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of *voluntary action* by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits.

Mr. Justice White, with whom concurred Mr. Justice Harlan, in his dissenting opinion in the first income tax case, said (157 U. S., p. 609):

> The decisions of this court hold that the collection of a tax levied by the Government of the United States will not be restrained by its courts. (*Cheatham* v. *United States*, 92 U. S., 85; *Snyder* v. *Marks*, 109 U. S., 189. See also *Elliott* v. *Swartwout*, 10 Pet., 137; *City of Philadelphia* v. *The Collector*, 5 Wall., 720; *Hornthall* v. *The Collector*, 9 Wall., 560.) The same authorities have established the

> rule that the proper course, in a case of illegal taxation, is *to pay the tax under protest or with notice of suit*, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax *under protest* the right to sue for its recovery. (Rev. Stats., sec. 3226.)

In the case at bar it does not appear from the petition that the tax was paid under "protest" or with "notice of suit." Can it, therefore, be maintained that without either of these prerequisites the taxpayer may make a voluntary payment to the collector with no more compulsion than that an unconstitutional law, as he claims, is upon the statute books requiring him to pay the tax, and after remaining silent for more than a year and a half thereafter apply to the collector of internal revenue at Washington for a refund of the money so paid, and upon that action predicate a suit against the Government under section 3226?

In the case of *Pacific Steam Whaling Company* v. *United States* (187 U. S., 447, 453) Mr. Justice Brewer, in delivering the opinion of the court, said:

> By the statute the clerk is made the collector of the license taxes, and if this tax was illegal and *paid under protest*, and nothing in this or other legislation of Congress restrict such an action, very likely under these authorities an action would lie against him for the money thus wrongfully taken from the petitioner.

In the case of *De Lima* v. *Bidwell* (182 U. S., 1, 179) Mr. Justice Brown, after a review of the cases, including the case of *Elliott* v. *Swartwout*, said:

> We are not impressed by the argument that if the plaintiffs insisted that these sugars were not imported merchandise they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that to prevent the seizure of the sugars plaintiffs did enter them as imported merchandise, but any admission derivable from that fact is explained by *their protest against the exaction of duties* upon them as such. They waived nothing by taking this course. *The collector lost nothing, since he was apprised of the course they would probably take.*

The plaintiff in the case at bar, as I have reiterated again and again, made no protest; neither did he notify the collector that he would bring suit for the recovery of the taxes. In fact, the collector, so far as it appears from this petition, knew nothing of this claim until eighteen months after the money had been paid and covered into the Treasury of the United States. And if a taxpayer waived, or could waive, his right to recover a tax which he voluntarily paid, such a waiver is clearly established from the allegations contained in this petition. We have not been able to find a single case from among the many decisions of this court in which an internal-revenue tax voluntarily paid

without "protest" and without "notice of suit" has been recovered back in a suit against the collector or the United States.

CONCLUSION.

By way of conclusion it may be suggested that if the plaintiff in error can maintain this suit upon the facts alleged in his petition, that every person who has paid a tax of a like character to the Government within the past two years can maintain an action for the recovery of the moneys so paid after making an application to the Commissioner of Internal Revenue for refundment. Or, in other words, that the statute of limitations alone will protect the Government from a refundment of the tax, if it be made to appear that such tax was illegally or erroneously assessed and collected.

We respectfully submit that if this be the law that the carefully guarded language which we find running through the various decisions of this court with reference to "protest" and "notice of suit" at the time of payment and "compulsory payment" were mere idle, useless, and unnecessary dicta. We can not believe that the Government intended to waive such a necessary prerequisite, and we feel that the public interests require that we submit the question for the consideration of this Honorable Court.

II.

A tax imposed upon any deed or instrument in writing whereby the title to any real property is transferred from one person to another is an indirect tax in the nature of a duty or excise within the meaning of the Constitution.

Upon this proposition we respectfully submit for the consideration of the court certain portions of the Government's brief in the case of *George C. Thomas* v. *United States* (No. 43, October term, 1903), and which case was specially assigned for argument with this case.

The particular portions of the Government's brief in the Thomas case which we desire to have incorporated in and considered as a part of this brief are as follows:

Part I, pages 10 to 21, inclusive.
Part II, pages 22 to 32, inclusive.
Part III, pages 32 to 39, inclusive.
(A), pages 44 to 46.
(B), pages 49 to 51.
(C), pages 52 to 54.
(D), pages 54 to 57.
VI, pages 72 to 77.
Appendixes A, B, C, and D, pages 79 to 105.

It is believed that the above references to the Government's brief in the Thomas case contain all of the arguments, points, and authorities which are common to the two cases under consideration.

The case at bar, however, presents certain additional questions for consideration. We shall,

therefore, confine our discussion in the remaining portion of this brief to those questions which are alone peculiar to a tax upon a deed or instrument in writing for the conveyance of real property.

A.

A tax imposed upon a deed or instrument in writing whereby the title to real estate is transferred from one person to another does not fall within any of the species of taxation heretofore determined to be direct taxes within the meaning of the Constitution by the decisions of this court.

The income-tax cases are the authority for the assertion that there are at least five different and distinct classes of direct taxes within the meaning of the Constitution. If there be any other species of direct taxes, it has remained undiscovered, so far as the decisions of this court are concerned, for more than one hundred years. We shall, therefore, not attempt to demonstrate that from the very nature of things there does not exist, nor can there be created, any tax which might in the future be determined by this court to be a direct tax within the meaning of the Constitution, but we shall devote our attention, in the first place, to establishing to the satisfaction of this court the two following propositions:

First: That the tax here imposed does not fall within any of the classes of direct taxes heretofore recognized as such by the decisions of this court.

Second: That the tax here imposed is not a direct tax, but an indirect tax in the nature of a duty or excise.

(See pages 35 to 39, inclusive, of the Government's brief in the case of *Thomas* v. *United States*.)

A capitation tax, a tax upon personal property, and a tax upon the income from personal property, each of which has been held to be a direct tax within the meaning of the Constitution, may, without further discussion, be eliminated from consideration in this case, for the reason that no one would seriously contend that a tax upon the conveyance of real estate is in any manner analogous to or legally equivalent to any one of those classes of direct taxes.

We have remaining a tax upon real property and a tax upon the income from real property, which we will briefly examine for the purpose of demonstrating that a tax upon the sale or conveyance of real property is in no manner the legal equivalent of a tax upon real property, or a tax upon the income from real property.

In the case of *Knowlton* v. *Moore* (178 U. S., 41, 82), Mr. Justice White, in delivering the opinion of the court, took occasion to point out in unequivocal language the true scope and meaning of the income-tax cases, and after observing that "the constitutional meaning of the word direct was the matter decided," said:

> Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of prop-

> erty from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property; Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned.

"A tax levied on a person solely because of his general ownership of real property" is easily differentiated and distinguished from a tax levied upon a person by reason of the sale or passing of the title to such real property from the owner to the purchaser. Such a tax surely can not be said to be levied upon one solely because of his general ownership of real property, nor are they legal equivalents in any sense of that expression. The land owner may hold and enjoy his real estate during his whole life, and upon his death his property may descend to his heirs, who may in turn hold and enjoy the property free from this particular tax. It is only when the land owner elects to enjoy one of the many incidents and rights of ownership, to wit: The sale of the property, that the tax accrues. But it may be said that the right to sell and dispose of real property is a natural right, and therefore differs very materially from

a mere license or privilege created and conferred upon the citizen under and by virtue of the laws of the various States. To this we reply that the power of Congress to tax is supreme, and that it is immaterial, so far as the taxing power of Congress is concerned, whether the subject of the tax be a natural right or a mere license or privilege conferred by statute, the only limitation being that if it be a direct tax it must be apportioned.

Having thus pointed out that a tax upon the sale or conveyance of real estate is in no manner the legal equivalent of a tax imposed on such real estate by reason of one's general ownership of such property, let us consider for a moment whether such a tax is the legal equivalent of a tax upon the income derived from the real property.

> The tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must apportioned. (*Knowlton* v. *Moore*, *supra*.)

If a tax upon the income derived from such real estate be the legal equivalent of a direct tax upon the real property from which the income was derived, and if a direct tax upon the real property is not the legal equivalent of a tax upon the sale of such real property, it must necessarily follow that a tax upon the sale of such real estate is not the legal equivalent of a tax upon the income from such real property.

A tax upon the sale of lands is a tax upon only one of the many rights and incidents peculiar to and necessarily connected with the ownership of real property, while a tax upon the land on account of one's general ownership thereof is manifestly a tax upon each and all of the many rights and incidents appertaining to the ownership of real property. The former tax can not be the legal equivalent of the latter tax for the reason that a part can never equal the whole. And if we apply the same reasoning to an income tax, the conclusion is the same. A tax levied upon the income from lands is necessarily a tax upon each and all of the many rights and incidents appertaining to the ownership of the lands, and, as was said by Mr. Justice White, "is the legal equivalent to a tax upon the lands." It follows, therefore, that such a tax is not the legal equivalent of a tax levied upon only one of the many rights and incidents necessarily connected with the ownership of the lands.

And again, this tax may be clearly distinguished from a general tax upon lands, and a tax upon the income or yield derived from lands. A tax upon lands by reason of one's general ownership of such lands operates upon all the rights and incidents connected with the lands, including the income or yield derived from the lands and the right of alienation, which may be considered as equivalent to alienation itself. You can not enjoy the

right of income or the right of alienation without having them subject to the tax imposed by reason of general ownership. The same is true concerning a tax upon incomes; such a tax operates upon each and every right and incident necessarily connected with the ownership of the lands, including the possession of the lands and the right of alienation. But a tax upon the sale of lands does not operate upon the lands generally—that is, upon the possession or the right to possession, nor upon the income or yield derived from the lands, for each of these rights may be enjoyed to the fullest extent and still the owner may be free from the burden of the tax upon the sale of lands. The right of sale is peculiarly different from the right of possession and the right of income in this, that the moment such right is exercised there is an immediate termination of all the rights pertaining to ownership. A tax imposed upon lands by reason of their general ownership, and a tax upon the income from such land, are taxes which are ever present and all embracing so far as the ownership of the land is concerned, while a tax upon the sale of lands does not in any manner interfere with the possession or enjoyment thereof, but only accrues upon the happening of the event of sale, which in itself absolutely terminates not only the right of possession and the right to the income, but all other rights and privileges arising from the ownership of lands, including of course the right to alienation itself.

From this process of reasoning we are forced to the inevitable conclusion that a tax upon a deed or instrument in writing whereby real property is conveyed from one person to another is not the legal equivalent of any one of the five species of taxation which have been decided by the income-tax cases to be direct taxes within the meaning of the Constitution.

It has been said by this court that taxation is "eminently practical," and that mere abstruse and subtle distinctions as to the particular nature of a specified tax will receive little consideration at the hands of this court for the purpose of placing it in a category which will render it invalid. As was said by Mr. Justice Peckham in *Nicol* v. *Ames* (173 U. S., 515):

> The commands of this Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.
>
> In deciding upon the validity of a tax with reference to these requirements, no

> microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economic problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

If we apply this language of Mr. Justice Peckham to the case here under consideration, we are forced to the conclusion that there is a "practical difference" between the tax here imposed and a tax imposed upon real estate by reason of one's general ownership of such property, and a tax imposed upon the income from such real estate.

It requires little or no argument to demonstrate that there is a "practical difference" between a tax imposed upon 160 acres of land by reason of one's general ownership of such property and a tax imposed upon the sale of such real estate; and that there is a like difference between a tax imposed upon the income from such real estate and the sale of the property from which the income is derived. "No microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax." The attempt has been made in this case to consider the tax here imposed "as a mere abstract, scientific, or economic problem" for the purpose of demonstrating that this particular tax might possibly be regarded as a direct tax, when, as a "practical matter" pertaining to the actual operation of the tax, it quite plainly appears that the tax is indirect.

We have, therefore, but one remaining question for determination, which is as to whether this particular tax can by any process of reasoning, as a new and independent proposition, be held to constitute a new species of direct taxation, and which during all of these years has remained undiscovered until the present day.

B.

Various theories upon which this law may be sustained as imposing an indirect tax, or a tax in the nature of a duty or excise.

(1)

The tax here imposed is an indirect tax within every definition of that term contained in the many decisions of this court and in the writings of the leading authors on the subject of political economy.

(See Government's brief in *Thomas* v. *United States*, pages 44 to 49.)

Tested by these definitions, the tax imposed by this law is an indirect tax, at least in the constitutional sense.

A tax upon the sale of real property can not be said to bear immediately upon the persons or parties to the transaction, nor upon the possession and enjoyment of their rights. The owner of the land is entitled to the free and undisputed possession thereof for all time to come, absolutely free from the operation of this law. He enjoys all the rights and privileges incident to his ownership of such land free from any tax. It is only upon the happening of an event or an exchange, to wit, the sale of the land, that the tax accrues, and in such event the law simply imposes a tax upon the deed or instrument in writing whereby the lands are conveyed, and either the seller or the buyer may pay the tax, wholly or in part, and the lands which are

the subject of the transaction pass unaffected to the purchaser. Consider for a moment the facts in this very case. If the stamp duty of $600 had not been paid by Chesebrough, the owner, or by the Chesebrough Building Company, the purchaser, there would be no question but that the deed would have passed the title to the property without the payment of the tax free and unincumbered from any lien. It is true that the plaintiff in error would have been liable to indictment and punishment for failure to obey the requirements of the law, but nevertheless the real property would have passed unaffected by the law from the plaintiff in error to the corporation.

While it is true that the law provides "that such instrument, document, or paper, if not properly stamped, shall not be competent evidence in any court," and "that such document or paper not being stamped according to law shall be deemed invalid and of no effect," the courts of last resort in the various States have frequently held that such provisions of the law are beyond the power of Congress to enact, and constitute an unwarranted interference in matters more or less exclusively under the control of the various States; and the mere fact that Congress has in this law attempted to render an unstamped deed invalid, is of little or no consequence in determining the constitutionality of the tax imposed. (*Small* v. *Slocumb*, 112 Ga., 279, 281; *Green* v. *Holway*, 101

Mass., 243; Cooley's Constitutional Limitations (7th ed.), 684.)

And again, this tax has the distinguishing characteristic of an indirect tax, in that it is paid voluntarily in this sense, that it may be avoided if the owner so desire by refraining from making the sale. There is no element of compulsion present; and, besides, the burden may be shifted, as before observed.

(2)

The tax here imposed is not a direct tax within the meaning of the Constitution, for the reason that it is impossible to apportion it among the several States according to population.

(See Government's brief in *Thomas* v. *United States*, pages 49 to 51, inclusive.)

(3.)

The tax here imposed may be sustained on the theory that it is a tax in the nature of a duty or excise upon transactions in business activity or forms of commercial dealing.

(See Government's brief in *Thomas* v. *United States*, pages 52 to 54, inclusive.)

If Congress has the power under the Constitution, as has been frequently asserted by the decisions of this court, to impose a tax upon a business, occupation, and the various forms of commercial dealings, it must necessarily follow that Congress may constitutionally tax one isolated transaction, which, taken with many such transac-

tions, in the aggregate constitute the business or occupation upon which a tax may be lawfully imposed.

Let us paraphrase the language of Judge Thomas, in the case of *George C. Thomas* v. *United States*, which is found on page 10 of the record in that case:

The buying and selling of lands, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business, a vocation, and is amenable to Federal taxation as such. Such persons maybe could not be so well reached if the statute laid a gross duty in the form of a license tax on the individual trader in lands. But in any case Congress has the power to distribute such tax upon each item of business falling under the traffic. For, if it may lay a tax of $100 on the vocation of buying and selling lands, it may lay a tax on the sale of lands at a rate of so many cents for each hundred dollars sold. The principal that justifies an impost of $10 per annum on a baker, supports the right to lay a tax of a fraction of a mill on each loaf of his bread. The principle that underlies the power, and not the peculiar form of its exercise, is regarded. Therefore it is not an answer that the instance charged may have been the only transaction of the dealer. How many sales of lands are necessary to constitute the business of a dealer in lands—five, ten,

twenty, or one; and at what state of his sale will his business be sufficiently apparent to compel the trader to stamp his transactions? At what point in his business career does the statute become constitutional? The act of 1898, like that of 1862, provides for a tax on many and varied occupations. How many items of business may a person do under each vocation, and escape the tax? How many instances of sales must the Government show against a defendant to establish the validity of the statute as to him? A tax is laid upon retail venders of tobacco. May a person sell tobacco now and then without paying a tax? So a tax is placed upon the venders of liquor, but may a person escape compliance with this tax upon the plea that the transaction was his first, second, or some other in numerical order, and that he did not sell liquor for a business? Is the answer that the offender never did it before a defense against the charge of violating the revenue statute? If such be the law, a tax may not be placed upon the occupation, business, or selling of liquors, tobacco, or lands, or any other thing consumable or nonconsumable, except under the necessity, in case of attempted enforcement, of proving beyond a reasonable doubt that the vender had made sufficient sales, so that it may be inferred that it was his regular vocation, and that he was engaged uniformly in the business. In that case the statute would become valid or invalid as the jury might determine.

The law is that he shall not pursue a certain business without paying the tax, and if Congress may validly declare that it may declare that he shall not, untaxed, do any of the business acts that fall within the occupation. A person pursues a business or vocation whether or not he announces it as his profession. It is what he does, and not what he professes, that determines. It seems to be a political rather than a judicial function to determine what shall constitute a business.

(4.)

The law may also be defended on the theory that the tax imposed is in the nature of a stamp duty or excise upon the deed or contract of sale itself, referring only to the fact that the subject-matter of the sale must be real property as a basis or ground for classification.

(See Government's brief in *Thomas* v. *United States*, pages 54 to 57, inclusive.)

It is difficult to conceive of any inherent difference between a contract for the sale of personal property and a contract or deed for the conveyance of real property, so far as it affects the constitutional power of Congress to levy a tax upon either the one or the other.

(5.)

A tax of this character has never before been questioned, although a similar law was enforced during the period of the civil war.

Conveyance.—Deed, instrument, or writing, whereby any lands, tenements, or other

realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents, etc. (Act of July 1, 1862, 12 Stat., 432, 481.)

(6)

A tax upon a deed or instrument in writing for the conveyance of real estate may be regarded as a tax upon the transmission of property inter vivos.

In the case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283, 288), Mr. Justice McKenna, in delivering the opinion of the court, said:

> It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

Mr. Justice White, in delivering the opinion of the court in *Knowlton* v. *Moore* (p. 56), after quoting the foregoing language from *Magoun* v. *Illinois Trust and Savings Bank*, said:

> Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it can not rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, *is beyond the power of Congress*, and is an interference by the National Government with a matter which falls alone within the reach of State legislation.

And again, on page 58, he says:

> All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is nevertheless *a usual subject of taxation*. Of course, in considering the power of Congress to *impose death duties*, *we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation*, as the right to regulate successions is vested in the States and not in Congress.

From this language it is apparent that the power of Congress to impose death duties is no greater

than the power of Congress to tax any other object of taxation which may be in existence, whether it be persons, property, or the various rights and incidents appertaining to property. If, therefore, a sale of real estate may be taxed by Congress, wherein exists the fallacy of reasoning that such a tax may be considered as *being imposed upon the passing or transmission* of the property occasioned by the sale?

> It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as was said in the license-tax cases (5 Wall., 462, 471), after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it (the taxing power of Congress) *reaches every subject*, and may be exercised at discretion." (*Knowlton* v. *Moore*, *supra*, p. 58.)

Thus we see that in the case of *Knowlton* v. *Moore* this court sustained the power of Congress to tax the transmission of property from the dead to the living upon the theory that the tax was imposed, not upon the right or privilege created under the laws of the various States, but upon the theory that the transmission of property occasioned by death was a usual subject of taxation, and that the taxing power of Congress reaches every subject and may be exercised at discretion.

And again, in the case of *Snyder* v. *Bettman* (190

U. S., 249, 252), Mr. Justice Brown, in delivering the opinion of the court, said:

> This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, *but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power.*

And again:

> If it be true that it is beyond the power of Congress to impose an inheritance tax because the descent of property is regulated by State statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation, and transmission of all property is governed by the laws of the several States. Particularly would this be so with reference to stamp duties imposed upon documents connected with the devolution of the property of a deceased person.

And Mr. Justice White, with whom concurred Mr. Chief Justice Fuller and Mr. Justice Peckham, in the dissenting opinion in *Snyder* v. *Bettman* (*supra*), said (p. 256):

> On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton* v. *Moore*, *was based solely upon the power of the United States to tax*, and that case therefore conveys no intimation that there is authority in the United States

> to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two—that is, between the broader power of a State resulting from its authority not only to tax, but also to regulate the transmission or receipt of property by death, *and the narrower power—that is, of taxation alone*, vested in the Government of the United States, was explicitly pointed out in *Knowlton* v. *Moore* (*supra*), at page 57.

The next question which arises is whether there be any real difference, so far as the direct and indirect character of the tax is concerned, between a tax upon the transmission of property from the dead to the living and a tax upon the transmission of property inter vivos.

The transmission of title in either case is a thing that exists, and is therefore within the range of the taxing power of Congress, and the mere fact that death duties have been regarded by all courts and all governments as usual subjects of taxation, while the transmission of property from the living to the living has not been so frequently the subject of taxation would seem to be immaterial. When the power of Congress to tax is challenged, we have only to refer to the Constitution, and if the object or thing taxed does not fall within the prohibitions contained in that instrument, the courts are powerless to limit the power of Congress in this respect to "usual subjects of taxation."

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In the case of *Knowlton* v. *Moore* it was held that a tax upon successions is within the power of Congress to impose, and that such a tax is not a direct tax but an indirect tax in the nature of a duty or excise.

Let us suppose that the Constitution of the United States contained a provision to the effect that upon the death of any person his property should descend to his heirs. Would not Congress under the taxing clause of the Constitution still have the power to impose a tax upon the transmission of such property from the dead to the living? In such a case the transmission of property from the dead to the living would stand on an equal footing with the transmission of property from the living to the living.

The idea here suggested has been well expressed by Judge Thomas in the case of *Thomas* v. *United States* (Record, p. 15):

> Thereupon it was demonstrated that an inheritance or legacy tax is laid upon the transmission of property. But what is "transmission" but the transfer of title by one person to another, vesting possession at the time when the enjoyment of the first holder or owner ceases by the termination of his life? If the donor effected the same distribution of his property in his lifetime, would not Congress have equal power to tax it? The assumed right of the Federal Government to lay death duties has no less remote basis than the highly theoretical and

> practically unknown power of the State government to seize and confiscate the property of an unoffending citizen who dies leaving heirs or donees. But the basic theory upon which such tax rests does not change the fact that it is imposed upon the transfer of the title of the property. The State has the power to regulate the use of property and to direct under what reasonable limitations sales thereof shall be made. As a basis of taxation this power inures to Congress quite as much as does the power to regulate successions. The conception that the State may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to a difference in degree of authority. The power of the State to regulate is a true and genuine dominion; it is constantly exercised; it furnishes some real basis for taxation; the power to appropriate a decedent's property is the merest speculation, which no civilized State would ever venture to use.

The idea of the learned judge seems to be that there is little difference, if any, between the right to transmit property at one's death to his heirs and the right to dispose of his property while living. It is a right which is recognized in every civilized state, and it is the merest fiction of law which regards such a right as only a privilege. We, therefore, contend that if Congress has the power to tax the transmission of property occasioned by death, that the same power exists in

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Congress to tax the transmission of property *inter vivos*. If a tax upon the transmission of property where death is the generating cause is an indirect tax in the nature of a duty or excise, it must be equally true that a tax upon the transmission of property where a contract is the generating cause is equally an indirect tax in the nature of a duty or excise.

CONCLUSION.

We maintain, in conclusion, that a tax imposed upon the sale of any certificate or share of stock in any corporation or association is similar in principle to a tax imposed upon the sale of produce or merchandise when made upon a board of trade or a stock exchange, for the reason that in either case the tax imposed operates directly upon the privilege or facility which is afforded the citizen under the laws of the various States to perform the particular act designated and selected by Congress to bear the burden of the tax imposed. And in the case at bar we are unable to draw any material distinction between a tax imposed upon the transmission of real property *inter vivos* and a tax imposed upon the transmission of real property in a case where death is the generating cause. And, while strictly speaking, such a tax may not be regarded as identical the one with the other, we are, nevertheless, forced to the conclusion that they are legal equivalents. The Congress has plenary power under the Constitution to tax "every subject," including the transmission of real property

when death is the generating cause and the transmission of real property when the volition of the owner is the generating cause. The fact that different causes produce like results is immaterial, and if the taxation of the *result* in one case be indirect taxation, the taxation of the *result* in the other case must equally be regarded as an indirect tax.

We do not recall a single decision of this court wherein the constitutional rule of apportionment has received favorable comment, though it has been frequently before this court for consideration and construction. Nor has the wisdom of the framers of the Constitution in inserting this provision in that instrument been successfully defended. This court is now urged to extend, by judicial construction, the application of that rule so as to embrace within this inhibition a tax upon the transmission of real property *inter vivos*. The Government, in the vigorous language of Mr. Justice Paterson, who was also one of the members of the Constitutional Convention, now appeals to this court to arrest by its decision in this case the further extension and application of this unjust and inequitable rule.

> On the part of the plaintiff in error it has been contended that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction as will extend the former and restrict the latter. I am not of that opinion. The Constitution has been considered as an accommodating

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> system. It was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature. *It is radically wrong; it can not be supported by any solid reasoning.* Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

We believe with Mr. Justice Paterson that the constitutional rule of apportionment is "radically wrong," and while the various branches of the Government are bound to recognize and yield "implicit obedience to this constitutional requirement," we maintain that it is no part of the duty of this court, except in cases free from doubt, to extend by judicial construction the application of this rule beyond the scope of the decisions heretofore rendered, and that the law here under consideration should not be placed in a category which will invalidate the tax simply because it may be demonstrated by "abstruse and subtle distinctions" of the "differing theories of political economists" to be in some respects analogous to a direct tax.

We therefore respectfully submit this case to this honorable court with the confident belief that the constitutional rule of apportionment will be held to be inapplicable to a tax imposed by Congress upon the transmission of real property *inter vivos*.

MILTON D. PURDY,
Assistant Attorney-General.

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